

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**AMERICAN CLASSIC
CONSTRUCTION, INC.,**

Respondent

and

Case 07-CA-143306

KIRK KAMINSKI, an Individual,

Charging Party

Jennifer Brazeal, Esq.,
Mr. Timothy Hatt,
for the General Counsel.
Karl Butterer,
for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. I heard this case on July 8, 2015, in Grand Rapids, Michigan. After the parties rested, I heard oral argument on July 13, 2015, and issued a bench decision on July 14, 2015, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In the complaint, the General Counsel alleged that American Classic Construction, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Charging Party Kirk Kaminski on or about December 19, 2014.

For the reasons stated by me on the record, I found that the General Counsel did not establish, by a preponderance of the evidence, that Respondent violated Section 8(a)(1) of the Act as alleged. Therefore, I ordered that the complaint be dismissed.

In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as an Appendix, the portion of the transcript containing this decision.¹

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

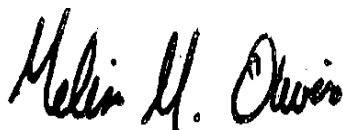
2. Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed.

Dated, Washington, D.C., August 4, 2015



Melissa M. Olivero
Administrative Law Judge

¹ The bench decision appears in uncorrected form at pp. 271 through 291 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as an Appendix to this certification.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

JUDGE OLIVERO: Good afternoon, everyone. We are here, telephonically, today for the issuance of my bench decision in the matter of American Classic Construction, Inc., and Kirk Kaminski, an Individual, Case 07-CA-143306. Present by telephone are Ms. Brazeal and Mr. Hatt for the General Counsel, Mr. Butterer for Respondent. Mr. Kaminski is not on the call, but he was made aware of the call today. Yesterday I entertained oral arguments telephonically, and today, after considering the testimony and evidence and the oral arguments presented in the case, I am prepared to render a decision. This decision is rendered pursuant to Sections 102.35(a)(1) and 102.45 of the Board's Rules and Regulations.

The charge in this case was filed on December 22nd, 2014 by Mr. Kaminski, and the complaint was issued on April 14th, 2015 against Respondent, American Classic Construction, Inc., which I may refer to as ACC during this decision. The complaint alleges at paragraph 7 that on or about December 19th, 2014, Respondent discharged the Charging Party in violation of Section 8(a)(1) of the National Labor Relations Act (which I will refer to as the Act). Respondent timely filed its answer to the Complaint, denying the allegation. Respondent later filed two affirmative defenses, one of which was withdrawn prior to the trial. Respondent's remaining affirmative defense is that it did not discharge Mr. Kaminski.

The case was tried before me in Grand Rapids, Michigan, on July 8th, 2015. After carefully considering all of the testimony and evidence offered at the trial, as well as the arguments of the General Counsel and Respondent, I make the following findings of fact:

Respondent admits, and I find, that it is a corporation engaged in the sale and delivery of construction materials at its facility in Bailey, Michigan, where it annually purchases and receives goods in excess of \$50,000 directly from points outside the State of Michigan. Based upon this admission, I find that Respondent is an employer engaged in commerce within the meanings of Section 2(2), (6), and (7) of the Act. In its answer, Respondent further admits, and I find, that Nathan Thompson, Jacob Thompson, and Leon Thompson have been at all material times supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

Nathan (also known as Nate) and Jacob (also known as Jake) Thompson are brothers, and Leon Thompson is their father. Respondent is owned by Nate, Leon, and Jake Thompson, each holding an equal one-third ownership share in the company. Respondent supplies materials to construction jobsites.

Relevant to this case, as demonstrated by Respondent's Exhibit 1, the United States Department of Transportation (or DOT) requires that vehicles like those driven by Respondent's employees undergo an annual inspection. Along with a report of annual inspection, the vehicles are given stickers to display indicating passage of the annual inspection and the date of the inspection. The uncontroverted evidence at the trial established that the date of the inspection may become illegible on the sticker due to being outside in the elements.

The Charging Party, Mr. Kaminski, was employed by Respondent as a delivery driver from late August or early September 2014 until December 19th, 2014. In this capacity, Mr. Kaminski

drove large trucks. He holds a Commercial Driver's License (or CDL) for this purpose. The evidence further establishes that Mr. Kaminski was involved in several accidents involving property damage during his short tenure with Respondent. At the hearing, Respondent provided photographs, identified as Respondent's Exhibit 2, taken after three of the incidents. The uncontroverted testimony establishes that these incidents cost Respondent \$30,000 to \$40,000.

The first incident involved Mr. Kaminski's use of a red crane truck. Although Mr. Kaminski initially testified that he drove this truck until it "went in for service," the evidence showed that Mr. Kaminski damaged the truck. While delivering a load of shingles, Mr. Kaminski mistakenly set down the truck's spare axle in addition to its outriggers, causing the truck's frame to twist. In fact, Respondent ended up having to buy a new truck to replace the red crane truck as a result of this damage. Mr. Kaminski eventually admitted that the truck almost tipped over and that he observed a crack in the red crane truck's frame after this incident.

In the second incident, Mr. Kaminski drove on a freshly poured concrete driveway, damaging it. Respondent was charged for the damage. Mr. Kaminski denied any knowledge that the driveway was freshly poured when he drove on it. In the third incident, Mr. Kaminski put a hole in a homeowner's roof while making a delivery and Respondent was charged for the damage. In the fourth incident, a tractor (referred to as a Pettibone) driven by Mr. Kaminski rolled backwards into a contractor's trailer. The owner of the trailer owed Respondent money, and Respondent wrote off the debt to cover the trailer damage. Although Mr. Kaminski testified that the tractor rolled backwards because of defective brakes, Jake Thompson testified that Mr. Kaminski forgot to set the parking brake. This final incident occurred on December 11th, 2014, just over a week before Mr. Kaminski's employment ended with Respondent.

All of the Thompsons testified that Kirk Kaminski was a good employee. However, they all believed that he lacked good judgment due to the number of accidents he had been involved in. As such, they decided to have a meeting with him to discuss his judgment after the accident of December 11th.

On December 17th, 2014, Mr. Kaminski was driving a blue flatbed truck for work. Mr. Kaminski stopped for gas in Hudsonville, Michigan and was approached by another truck driver. The other driver (whose name is not known) approached Mr. Kaminski and informed him that his DOT sticker was not visible. Mr. Kaminski and this individual then located the sticker and wiped it off. According to the sticker, the inspection for the vehicle Mr. Kaminski was driving expired in November 2013. It should be noted that during his initial direct examination testimony about this meeting, Mr. Kaminski did not mention inspection paperwork or looking in the vehicle's glove box for the paperwork.

After viewing the sticker, Mr. Kaminski returned to ACC where he first found Kevin Burns and asked if Respondent's trucks had been federally inspected. Mr. Burns responded that he had no idea. Mr. Burns' job title and employer were debated during the trial. However, I do not find this issue material to my findings because Mr. Kaminski's complaint was eventually raised to a supervisor of ACC. In addition, Mr. Kaminski gave testimony about this conversation that I did not find credible, when he stated that Mr. Burns called another employee of Respondent, Tim Gardner. Mr. Kaminski testified that he was able to overhear Mr. Gardner's end of the telephone conversation from 5 to 6 feet away and that Mr. Gardner said that Mr. Kaminski

should knock his shit off and quit his whiny BS. He testified that Mr. Burns then walked away. It does not seem plausible that Mr. Kaminski could hear Mr. Gardner's statement with this degree of specificity from 5 to 6 feet away, but did not remember anything else about the conversation. Therefore, I do not credit his testimony on this point.

Later that afternoon, James Aishe, another delivery driver employed by Respondent, returned to Respondent's facility and Mr. Kaminski discussed the inspection issue with him. The two then went to Mr. Aishe's truck and found no inspection sticker. Although Mr. Kaminski testified that he and Mr. Aishe went to Mr. Aishe's truck and found no "inspection sticker or paperwork," his testimony is not corroborated. In fact, Mr. Aishe directly contradicted Mr. Kaminski on this point by testifying that Mr. Kaminski did not mention inspection paperwork. Later, on cross-examination, Mr. Kaminski added to his earlier testimony by stating that he checked the glove boxes of Respondent's trucks for inspection paperwork that afternoon. He also added, for the first time on cross-examination, that the unknown driver at the Hudsonville gas station said that his truck needed verification of inspection in the truck. For these reasons, I credit the testimony of Mr. Aishe that they only looked at the sticker.

The next day, December 18th, 2014, Mr. Kaminski and Mr. Aishe went to speak with Timothy (also called T.J.) Sutton. During this conversation, Mr. Kaminski told Mr. Sutton that the sticker on one of Respondent's trucks was illegible. At this point, Mr. Sutton either told Mr. Kaminski and Mr. Aishe to go tell Jake Thompson, or he took them to Jake Thompson. In any event, Jake Thompson, T.J. Sutton, Mr. Kaminski, and Mr. Aishe were present for a subsequent conversation in which Mr. Aishe told Jake Thompson that the sticker on his truck could not be read and Mr. Kaminski said that his truck's inspection was out of date. Jake Thompson told them to shut the trucks down and not run them again until the inspection issue was figured out. All of the witnesses agreed that Jake Thompson did not appear angry or upset with the statements of Mr. Aishe and Mr. Kaminski.

Although Mr. Kaminski testified that Jake Thompson sent both he and Mr. Aishe home after this conversation, Mr. Aishe testified that Jake Thompson put him to work around the shop. In this instance I credit the testimony of Mr. Aishe. The General Counsel did not produce any payroll documents or timecards that would establish that Mr. Aishe did not work on December 18th, as he testified. Therefore, as I have credited the testimony of Mr. Aishe over Mr. Kaminski, I find that Mr. Aishe worked on December 18th. I further credit the testimony of Jake Thompson that he offered Mr. Kaminski work that day, but that Mr. Kaminski declined it.

When Mr. Kaminski got home that day, he posted the following statement on his Facebook page, "Well I got sent home today because none of are [sic] trucks are up to date on there [sic] federal inspections so not legal to be on the road. You would think that this would be important but I guess not." This statement and two other Facebook posts are in evidence as General Counsel's Exhibit 3. Mr. Kaminski testified that his Facebook page is public, meaning it can be seen by anyone. However, no evidence other than the testimony of Mr. Kaminski was presented that any employee or supervisor or agent of Respondent may have seen this post.

On December 18th, Jake Thompson called the mechanic who inspected Respondent's trucks, Jack Brand. Mr. Brand told Jake Thompson that having a proper sticker did not matter, but that the trucks needed to have current inspection paperwork in their glove boxes. Jake Thompson

then asked T.J. Sutton to look in the trucks for the inspection paperwork. T.J. Sutton looked in the glove boxes of Respondent's trucks and discovered that all of the trucks were in compliance with federal inspection standards. As testified to without contradiction by Jake Thompson and T.J. Sutton, Respondent was aware by December 18th that all of the trucks met federal inspection guidelines. This testimony is further bolstered by that of Mr. Aishe, who testified that on December 19th he was told that it was "all good" and to go ahead and run his truck that day.

Friday, December 19th was Respondent's weekly payday for its employees. There is no disagreement that Jake and Leon Thompson met with Mr. Kaminski on the morning of December 19th in Jake Thompson's office. However, what happened during the meeting again requires a credibility determination.

Mr. Kaminski testified that on December 19th, Leon Thompson approached him and said he wanted to talk to Mr. Kaminski after he got his check. Mr. Kaminski said that Leon Thompson said that he did not feel that he (Mr. Kaminski) was mature enough to operate Respondent's equipment. Jake Thompson then allegedly told Leon Thompson about the previous day's Facebook post. At this point, according to Mr. Kaminski, Leon blew up, stating that this is bullshit, he couldn't believe that Mr. Kaminski would do this, and that he was fucking stupid. Ultimately, according to Mr. Kaminski, Leon Thompson said that he did not feel like Mr. Kaminski should work here anymore, at which point Jake Thompson told him to get his timecard. Mr. Kaminski then retrieved his timecard and was given his last paycheck. According to Mr. Kaminski's testimony, Jake and Leon Thompson did not bring up the "two incidents" in which he was involved until near the end of the meeting. I do not credit this testimony because: (1) the evidence established Mr. Kaminski was involved in four incidents, and (2) I have credited the testimony of Jake, Leon, and Nate Thompson that they planned this meeting to discuss the incidents with Mr. Kaminski.

Jake and Leon Thompson testified that the meeting went very differently. The Thompsons testified that they wanted to speak to Mr. Kaminski that day about his job performance, specifically the accidents he had been involved in. They showed him the photographs contained in Respondent's Exhibit 2. Leon Thompson testified that he told Mr. Kaminski that they had to stop the bleeding, by which he meant that all of these accidents were costing ACC money and that it needed to stop. On cross-examination, Mr. Kaminski agreed that Leon Thompson told him that he was costing the company money (something Mr. Kaminski did not mention in his direct testimony regarding what happened at the meeting). The Thompsons discussed Mr. Kaminski's negligence, the costs of the accidents, and their opinion that these accidents could have been avoided.

During the meeting, Leon Thompson said that "stupidity" can be avoided or that this "stupidity has to stop." Mr. Kaminski became angry when Leon Thompson used the word "stupidity," protesting that he was not stupid. Mr. Kaminski and Leon Thompson argued for a bit, and at the end of the meeting, Leon Thompson said, "let's get busy" or "let's get to work." However, Mr. Kaminski was still angry and said, "I'm done," and that he did not want to work there. He demanded his last check, which Jake Thompson had to handwrite using a check from a different business account owned by the Thompsons. This final paycheck is in evidence as General Counsel's Exhibit 4. Jake Thompson tried to talk Mr. Kaminski out of quitting and said

he would talk to his brother Nate, who was not at the meeting, and to his father about trying to talk Mr. Kaminski out of quitting.

Shortly after this meeting, Mr. Kaminski and Jake Thompson engaged in an exchange via text message. The exchange is contained in General Counsel's Exhibit 5. Mr. Kaminski started the exchange off by stating, "Hey bud thanks for every thing [sic] but don't waste your time talking things over with your family. I don't want to work for you guys." Jake Thompson responded to Mr. Kaminski by telling him, "I hope you think it through." I find these messages more consistent with the version of events relayed by the Thompsons than that testified to by Mr. Kaminski. Jake Thompson's statement that Mr. Kaminski should think it through, coupled with Mr. Kaminski's statement that he did not want to work for ACC, seems more consistent with Mr. Kaminski quitting than with his being discharged.

Mr. Kaminski made another Facebook post on December 19th stating, "Well just got let go today," and asking for help finding a new job. On December 20th he posted, "Does anyone now [sic] who to talk to or call about getting fired for not wanting to drive illegal trucks?" In agreement with counsel for Respondent, I find the text messages more dispositive of what occurred on December 19th than the subsequent Facebook posts. I find the text messages were made closer in time to Mr. Kaminski's meeting with Jake and Leon Thompson and that the Facebook posts were made after a period of reflection. Although there are no times listed on either the text messages or the Facebook posts, I note that Mr. Kaminski testified about the text messages first and, therefore, I must assume that his first text message was sent before his first Facebook post was made. In addition, I note that nowhere in the text messages does Mr. Kaminski ask Jake Thompson why he was fired or mention being fired.

These are the facts as I have found them. Now I shall turn to the discussion and analysis portion of the decision. Most of my credibility resolutions have been made as part of the findings of fact herein; however, I have been presented with two versions of certain events which cannot be reconciled. Therefore, I feel the need to address the credibility of the witnesses further.

Generally, I did not find Mr. Kaminski's testimony credible. He frequently testified using qualifying language (such as "to my knowledge" and "to my understanding") and generalities and had to be reminded by the General Counsel to testify about his observations, rather than his impressions. He sparred with Respondent's counsel on cross-examination. In addition, I cite the following examples in support of my decision not to credit Mr. Kaminski.

Mr. Kaminski changed his testimony during the course of the hearing. Initially, he testified that Jake Thompson told him to retrieve his timecard during the December 19th meeting with Jake and Leon Thompson. Then, on rebuttal, he testified for the first time that he was asked to retrieve his timecard after the meeting ended. He also initially testified that the unknown driver at the gas station told him that his truck's sticker was not visible and later that it was out of date, but he did not mention anything about looking in the truck's glove compartment for an inspection report.

Later, under cross-examination, Mr. Kaminski testified that he looked in the glove box because the unknown driver told him that there had to be verification of inspection in the truck.

Mr. Kaminski also added to his testimony as the trial progressed. In his initial testimony about his conversation with Kevin Burns, Mr. Kaminski only testified that he asked Mr. Burns if Respondent's trucks were federally inspected. Later, under cross-examination, Mr. Kaminski testified that he told Mr. Burns that his truck's sticker was out of date and that there was no paperwork on the truck.

Now, I mention this issue of verifying the inspection paperwork in the truck versus the sticker not because I believe that a sticker is required, but rather because it bears on Mr. Kaminski's credibility. Whether the protested working condition was actually as objectionable as the employee believed it to be is irrelevant to whether their concerted activity is protected by the Act. *Tamara Foods*, 258 NLRB 1307, 1308 (1981), *enfd.* 692 F.2d 1171 (8th Cir. 1982), *cert. denied* 461 U.S. 928 (1983). Section 7 of the Act protects the rights of employees to engage in protests over what the employees believe to be unsafe working conditions. *Tamara Foods*, 258 NLRB at 1308. Therefore, the protected nature of Mr. Kaminski's and Mr. Aishe's protest over the inspections of the vehicles, whether it related to stickers or inspection paperwork, was not rendered unprotected because they may have been mistaken about whether stickers are required or whether the inspections were up to date or not. Instead, I comment on this issue only as it relates to credibility.

Mr. Kaminski also minimized his involvement in the several accidents referenced herein. On direct examination, he testified that he was involved in only two accidents, the red crane truck incident and the incident in which he rolled into a contractor's trailer. Under cross-examination, however, he admitted that he was involved in the concrete driveway incident. Additionally, Mr. Kaminski initially denied putting a hole in a customer's roof, then quickly changed his testimony and admitted that he had done so. Given Mr. Kaminski's reticence to testify about these incidents, I instead credit the testimony of Jake and Nate Thompson about them. For all of these reasons, as well as other reasons mentioned in this decision, I generally did not credit Mr. Kaminski's testimony.

As stated above, I found that the testimony of Mr. Aishe was credible. As a current employee of Respondent testifying under subpoena from the General Counsel, his testimony is entitled to enhanced credibility. *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995), *affd.* *mem.* *NLRB v. Flexsteel Industries*, 83 F.3d 419 (5th Cir. 1996). His demeanor on the witness stand was steady and sure. He did not waver under cross-examination, and the General Counsel chose not to undertake a redirect examination of him. In addition, the General Counsel did not attempt to impeach his testimony. Therefore, I have credited Mr. Aishe's testimony over that of other witnesses.

I further found T.J. Sutton to be a credible witness. He testified in a forthright manner, and he did not waver on cross-examination. His testimony was not contradicted in any meaningful way by other witnesses. Therefore, I have credited his testimony.

I also found Jake Thompson to be a credible witness. His testimony was straightforward and had the ring of truth. He did not quibble with Counsel for the General Counsel or seem argumentative on cross-examination. Furthermore, the General Counsel did not impeach him or get him to change his testimony under cross-examination.

Leon Thompson also appeared to be a credible witness during his brief testimony. His testimony did not waver at all while he was on the stand. He appeared calm and sure of himself.

I found Nate Thompson to be a credible witness during his rather brief testimony. I credit the testimony of Nate Thompson regarding the amount of damage caused by Mr. Kaminski during his tenure with Respondent. Nate Thompson testified without contradiction on this point. He also testified that he is responsible for Respondent's financials. To the extent he testified about what occurred at the December 19th meeting, I do not credit this hearsay testimony.

Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]. The legal standard for evaluating whether an adverse employment action violates Section 8(a)(1) of the Act is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that an employee's protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. The adverse employment action alleged by the General Counsel in this instance was a discharge.

I have found that Mr. Kaminski and Mr. Aishe engaged in protected concerted activity by raising an issue with the federal inspections of Respondent's trucks to Mr. Sutton and Jake Thompson. I further find that Respondent was aware of this activity, as Jake Thompson admitted knowledge. However, I do not find that the General Counsel has proven the adverse employment action alleged — a discharge. As I have credited the testimony of Jake Thompson and Leon Thompson over that of Mr. Kaminski, I do not find that he was discharged as alleged by the General Counsel. All of Respondent's witnesses testified that Mr. Kaminski quit or that they were told that he quit. Mr. Kaminski alone testified that he was fired by Leon Thompson.

The General Counsel has unsuccessfully attempted to bootstrap earlier complaints by Mr. Kaminski about non-operational headlights and a truck that would not start to his complaints about the absence of federal inspection paperwork. This is likely because the evidence showed that neither Mr. Aishe nor Mr. Sutton were disciplined or discharged for their roles in bringing the federal inspection issue to the attention of Jake Thompson. None of these earlier complaints were alleged in the charge or in the complaint as being a motivating factor for Mr. Kaminski's alleged discharge or as being protected concerted activity. I am not convinced that Mr. Kaminski's earlier complaints, all of which were remedied, played any part in the Thompsons' decision to talk to him on December 19th.

In addition, as noted above, I do not find that Mr. Kaminski was discharged. I have found that the fact that Respondent had not prepared a final paycheck for Mr. Kaminski in advance of the December 19th meeting weighs against a finding that Mr. Kaminski was discharged. Furthermore, Mr. Kaminski testified that the meeting was heated, while Jake and Leon Thompson testified it was not. I credit the testimony of the Thompsons who both appeared calm throughout the hearing. Mr. Kaminski, however, became animated at various points during his cross-examination testimony. I further note that the tone of Mr. Kaminski's angry Facebook posts

in General Counsel's Exhibit 3 lead me to believe that it was he who lost his temper during the December 19th meeting and quit.

In summary, I do not find that the General Counsel has established, by a preponderance of the evidence, that Respondent discharged Mr. Kaminski as alleged in paragraph 7 of the complaint. Therefore, I make the following conclusions of law:

Respondent, American Classic Construction, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The General Counsel has not established by a preponderance of the evidence that Respondent discharged Charging Party Kirk Kaminski as alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended order:

The complaint is dismissed in its entirety.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. When the certification is served upon the parties, the time period for filing exceptions will begin to run. I direct your attention to the Board's Rules and Regulations regarding the time period for filing exceptions. I want to thank counsel for the General Counsel and counsel for Respondent for your professionalism and competence in presenting this case. With that, the trial is now closed, and we are off the record.